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No. 87-1190

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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5 pp

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We file this reply only to respond to one serious misstatement in respondents' brief in opposition. The government has argued consistently, and not "for the first time" in the petition, that "respondents were not entitled to a factual determination as to whether there was one or multiple conspiracies" (Br. in Opp. 14).

Respondents' motion to vacate sentence was filed on February 22, 1983. The government's response was filed on March 21, 1983. The response stated (at 11): "In the case at bar, the factual allegations of the two indictments on their face charge separate conspiracies, and the double jeopardy claim must be evaluated under the version of facts set forth in the indictments." It also stated (at 14): "The facts and issues raised by the *Beachner* defendants are precisely the kind that must either be raised before a plea of guilty or be waived."

On March 30, 1983, the parties filed a joint stipulation in the district court. The stipulation, which is quoted in full in Judge Barrett's dissent from the decision of the en banc court of appeals in this case (Pet. App. 63a), reads as follows:

> Come now the parties and stipulate that the Court may consider the record made in the evidentiary hearing on the Motion to Dismiss filed by Beachner Construction Co., Inc. in *United States v. Beachner Construction Co., Inc., et al.*, Case No. 82-20076-01 in the United States District Court for the District of Kansas in ruling on the merits of defendants' Motion to Vacate Sentence Pursuant to Rule 35(a) in the instant case.

Respondents apparently contend that this unremarkable stipulation represents an abandonment of the government's previous position that respondents were bound by the facts that they had admitted at the time their pleas were taken and were not entitled to a new factual determination. The government, however, made no such abrupt about-face.

On November 10, 1983, government counsel wrote to the district court enclosing, at the court's request, the transcript of the evidentiary hearing in the *Beachner* case. Counsel wrote:

> I would like to take this opportunity to reiterate our position that a review of this evidentiary record by the Court is not necessary, and, indeed, would not be appropriate in determining whether the sentences imposed by this Court upon [respondents] are unlawful under the Double Jeopardy Clause of the Constitution. [Respondents'] counseled pleas admitted the factual allegations of the two indictments and those indictments on their face established two separate

agreements, each a conspiracy in violation of the antitrust laws. Consequently, the Court's inquiry as to whether conviction on both counts would violate the Double Jeopardy Clause cannot look beyond those indictments.

> [Respondents] have waived any double jeopardy claims they might have asserted prior to their pleas * * *. However, even if the Court finds that [respondents] may yet assert a double jeopardy claim, that claim must be judged in light of the facts set forth in the indictments. *Kerrigan v. United States,* 644 F.2d 47 (1st Cir. 1981); *see also Menna v. New York,* 423 U.S. 61, 68 n.2 (1975). * * * In the cases at hand, by admitting the facts set forth on the face of the indictments, [respondents] have defeated their double jeopardy claims. * * * Therefore, were the Court to determine that [respondents] have not waived their Double Jeopardy claim, the Court could, and should resolve that Double Jeopardy claim by a review of the indictments alone.

On November 18, 1983, the district court denied respondents' motion to vacate sentence, agreeing with the government that respondents had no right to obtain a factual determination whether two conspiracies or only one existed (Pet. App. 112a-123a). In addition to agreeing (*id.* at 119a-122a) with the analysis of *Kerrigan* v. *United States,* 644 F.2d 47 (1st Cir. 1981), on which the government has consistently relied, the district court wrote (Pet. App. 123a): "[W]e do not believe at this late date [respondents] should be permitted to take advantage of a factual determination that is inconsistent with the facts [respondents] admitted in pleading guilty to the indictments alleging two separate conspiracies."

On respondents' appeal of this ruling, the government continued to urge that the district court had correctly re-

fused to make a factual determination of respondents' contention that there had been only one conspiracy (see, *e.g.*, U.S. Br. 22-23, C.A. No. 83-2558). The court of appeals, however, rejected the government's position and remanded "for a factual determination" (Pet. App. 24a).

On remand in the district court, we noted our disagreement with the appellate decision and indicated that we might seek certiorari from this Court once the case ceased to be in an interlocutory posture (Br. for the United States on Remand from the Tenth Circuit Court of Appeals for a Factual Determination 4 n.2). On appeal from the district court's ruling on remand, our primary argument was that the prior en banc decision—in which we had urged that respondents could not obtain a factual determination—should be reconsidered (see Pet. App. 2a). It is on that issue that we now seek certiorari.

In sum, respondents are quite wrong to suggest that the government is objecting "for the first time" to respondents' belated attempt to obtain a factual determination of the one-conspiracy-or-two question. We have diligently pursued our objections to any such determination throughout this litigation.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General

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